

NOTICE TO EMPLOYERS REGARDING OBLIGATIONS UNDER THE VIRGINIA WORKERS' COMPENSATION ACT

Employers Guide

Virginia law requires every employer who regularly employs three or more full-time or part-time employees to purchase and maintain workers' compensation insurance. Employers with fewer than three employees may voluntarily come under the Act.

METHODS OF INSURING LIABILITY

1. Purchase and maintain a workers' compensation policy from a company licensed in Virginia;
2. Apply to the Virginia Workers' Compensation Commission for approval as an independent self-insurer;
3. Become a member of a group self-insurance association licensed by the Virginia State Corporation Commission; or
4. Enter into an agreement with a professional employer organization as provided in Section 65.2-801.A.4 of the Code of Virginia.

INFORMATION ABOUT CERTAIN BUSINESS ENTITIES

1. Sole proprietors and partners are considered owners of businesses and are not covered by workers' compensation. However, sole proprietors and partners may elect to obtain coverage for workers' compensation liability by purchasing insurance.
2. Members of a limited liability company (LLC) are considered to be owners of a company and are not covered by workers' compensation unless specifically covered by an insurance policy or either elected or appointed as a manager. The manager of an LLC is treated as a corporate officer under the Act.
3. A corporation's officers may choose to reject workers' compensation coverage for accidents, but not for occupational diseases. To do so, officers must file a "Notice of Rejection" with the insurer and with the Commission. If the officers are paid regularly, they are nevertheless counted as employees to determine jurisdiction under the Act.

Note: For non-profit corporations under §501(c)(3) of Title 26 of the U.S. Code, unpaid officers are not considered employees. Unpaid officers need not formally reject coverage and are not counted as employees in determining jurisdiction under the Act.

EMPLOYER DUTIES TO EMPLOYEES AND TO THE COMMISSION

1. Post in a prominent place a notice of workers' compensation benefits (VWC Form 1) that substantially resembles the notice produced by the Virginia Workers' Compensation Commission. Copies may be obtained by writing to the Commission, 1000 DMV Drive, Richmond, Virginia 23220. Posting of this notice is required by Commission Rule 7.2.
2. Ensure that every accident is reported to the insurance carrier on the "Employer's Accident Report" (VWC Form No. 3). The carrier will then report the accident to the Commission in the proper format. (Note that the Employer's Accident Report is also accepted by OSHA as a supplemental report to the basic OSHA log.)
3. After receiving notice of an accident or occupational disease, provide the employee with a panel of at least three physicians, who are not affiliated with each other, from which to select a treating

physician. If the employer does not provide a panel, the employee may elect to receive treatment from any healthcare provider.

In an emergency, the employee may be treated at a hospital, emergency room, or other emergency care facility. The employer should provide a panel of doctors as soon as possible after the emergency treatment.

(Note that a sole proprietor or partner who elects coverage must notify the insurance carrier who will provide the panel of treating physicians.)

4. Give employees a thirty-day notice if your workers' compensation insurance is cancelled or not renewed.
5. An insurance agent can assist an employer to obtain coverage under the Virginia Workers' Compensation Plan. If a workers' compensation policy is not readily available in the regular or voluntary market, contact the National Council on Compensation Insurance (NCCI) at (561) 893-1000 for additional assistance in obtaining coverage. NCCI administers the Virginia Workers' Compensation Plan.
6. Employers who refuse or neglect to obtain workers' compensation insurance can be fined up to \$5,000.00. Continuing failure to obtain this insurance can result in an order prohibiting an employer from conducting business. Employees of uninsured employers may bring suit against the employers for damages resulting from their injuries.
7. Professional Employer Organizations (PEOs): PEOs doing business in Virginia must register with the Commission pursuant to Virginia Code § 65.2-803.1

WHO IS COVERED BY THE VIRGINIA WORKERS' COMPENSATION ACT?

As a general rule, employers with three or more employees in Virginia are subject to the Workers' Compensation Act. Almost everyone working for another under a contract of hire or in an apprenticeship is considered an employee, including minors and including aliens regardless as to whether they are lawfully in the United States. However, the Act provides for certain special situations detailed below.

The following are generally considered employees:

- Apprentices and trainees, as long as the training relates to their jobs.
- Part-time employees and working family members.
- Members of the Virginia National Guard, Virginia State Defense Force, and US Defense Corps of Virginia.
- Officers and employees of state and local governments, including police, firefighters, sheriffs, deputies, commissioners of tax and revenue, Commonwealth's attorneys, circuit court clerks and their employees.
- Volunteer police, rescue workers, and firefighters if:
 1. coverage is extended to them by the governing body of the locality in which they work, or
 2. the volunteer unit itself elects to provide for workers' compensation coverage.
- Officers of corporations.

Corporate officers can reject coverage for accidents. They cannot reject coverage for occupational diseases. If corporate officers are not paid salary or wages on a regular basis at an agreed upon amount and they reject coverage under this title pursuant to §65.2-300, they are no longer counted as employees for jurisdictional purposes.

- Employees of an independent contractor or sub-contractor who are doing the same kind of work as

those who are contracting for the work.

- Sole proprietors, partners, and others who have elected to be covered by the Workers' Compensation Act.

The following are generally not considered employees:

- Individuals who are properly classified as independent contractors under Virginia law (unless they specifically and formally choose to be included in their own workers' compensation insurance policy).
- Elected state and local officials (unless coverage is extended to them by the governing board of the governmental entity through a duly adopted ordinance). -- Taxi cab and executive sedan drivers if they are excluded from taxation under the Federal Unemployment Tax Act.
- Licensed real estate people who are contractually identified as independent contractors, who earn substantially all their income from commissions, and who are not treated as employees for federal income tax purposes.
- Casual workers.
- Domestic workers.
- Farm workers, unless the employer regularly has more than two full-time employees.
- Railroad workers working for common carriers involved in interstate or foreign commerce.
- Noncompensated employees, officers, and directors of non-profit corporations.
- Employees of federal instrumentalities.
- Employees of businesses that regularly employ fewer than three employees.

Note that these lists are only general guides. A determination of the status of employee is difficult and is a frequently litigated issue.

GUIDELINES FOR CONTRACTORS AND SUBCONTRACTORS

Warning: Neither the Workers' Compensation Commission nor the State Corporation Commission can provide legal advice on individual contractor/subcontractor situations. The status of an independent contractor, a subcontractor, and an employee must be determined based upon the facts of each case. The following are general guidelines only.

1. 1. a formal election of coverage has been made; or
2. a written agreement has been reached among the independent contractor, the employer, and the insurance carrier that coverage will be provided.
2. Employees versus independent contractors: The Workers' Compensation Act defines an employee as a person under written or implied contract of hire "except one whose employment is not in the usual course of the trade, business, occupation or profession of the employer."

In distinguishing between an employee and an independent contractor, some important considerations are (1) the right to hire, (2) the power to dismiss, (3) the obligation to pay wages, and (4) the power to control.

3. Independent contractors are not automatically eligible for workers' compensation: An independent contractor, who is generally a sole proprietor or partner, is not entitled to workers' compensation benefits unless:
4. Employees of contractors are often eligible for workers' compensation: The regular employees of the independent contractor, however, are entitled to workers' compensation benefits so long as the independent contractor employs three or more employees.
5. Statutory employers: When a sole proprietor, partnership, or corporation contracts to perform work or

provide services that are part of the same trade, business, or occupation of the employer, a contractor/subcontractor relationship is established. The contractor becomes the statutory employer of the employees of the subcontractor.

When the statutory employer is subject to the Virginia Workers' Compensation Act by virtue of having three or more direct employees or employees of subcontractors, the statutory employer or its insurance carrier becomes liable for the payment of workers' compensation benefits to the injured employees of the subcontractor. This is true whether the subcontractor fails to carry workers' compensation insurance as required by law, or is not required to have workers' compensation insurance.

6. Effects on statutory employer: The subcontractor's employees are considered employees of the contractor both for liability, and for determining whether the general contractor has three or more employees and must therefore provide workers' compensation coverage under Virginia law.
7. Effects on subcontractors: Since a potential statutory employer relationship exists for any particular job done through subcontractors, and since the insurance carrier does not have the right to inspect the employment records of the subcontractor, carriers have tended to assess a premium on the employer for his or her subcontractors. Potential statutory employers have often responded by requiring a subcontractor to provide proof of workers' compensation insurance coverage, or by having a percentage of the contract cost withheld to offset the potential cost of insurance premiums.

The fact that a contractor withholds a percentage of the contract cost does not afford any coverage to the subcontractor.

VIRGINIA WORKERS' COMPENSATION COMMISSION

WORKERS' COMPENSATION

REQUIREMENTS FOR EMPLOYERS IN VIRGINIA

This informational brochure is provided pursuant to Virginia Code § 65.2-800. It is not intended and may not be considered as providing legal advice or advisory opinions. If you have legal questions regarding the information provided, please contact an attorney.

For more details you should consult the Virginia Workers' Compensation Act, Title 65.2 of the Code of Virginia. The Act is available on the Commission's web site at www.vwc.state.va.us, at local public libraries and can be purchased by writing to the Comptroller, Virginia Workers' Compensation Commission, 1000 DMV Drive, Richmond, VA 23220.

Questions about insurance underwriting issues, such as premiums charged by an insurance company, or classification, should be directed to the Bureau of Insurance of the State Corporation Commission (Consumer Services Section, PO Box 1157, Richmond, VA 23209).

(Revised 1/16/01)